

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000405-001 DT

01/11/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

KENNETH M FLINT

v.

JOHN F MONFELI (001)

CAMERON A MORGAN

REMAND DESK-LCA-CCC

SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number M-751-TR-2010-031256.

Defendant-Appellant John F. Monfeli (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence. Defendant contends the trial court erred in concluding A.R.S. § 28-1382(E)(1) was constitutional. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On September 29, 2010, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); driving under the extreme influence, A.R.S. § 28-1382(A)(1) & (A)(2); failure to drive in one lane, A.R.S. § 28-729(1); and no proof of insurance, A.R.S. § 28-4135(C). On October 18, 2010, the State filed an Allegation that Defendant had a prior conviction for driving under the extreme influence, with a violation date of August 26, 2005, and a conviction date of October 10, 2005. The parties filed a Stipulation to submit the matter on the record, which contained the following stipulations: (1) Defendant's BAC was 0.294 within 2 hours of his driving; and (2) Defendant had a prior DUI conviction in the Phoenix City Court. (Stipulation, dated Sept. 13, 2011.) On that same date, the parties submitted the matter on the record.

On November 18, 2011, Defendant's attorney submitted a Sentencing Memorandum contending the sentencing scheme for a second offense of driving under the extreme influence was unconstitutional, and on November 28, 2011, the State filed a Response. On January 17, 2012, the trial court denied Defendant's motion. On January 24, 2012, the trial court imposed sentence, and on that same date, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUES.

A. Is this appeal procedurally barred.

The State contends Defendant is procedurally barred from pursuing this appeal because he did not comply with the requirements of A.R.S. § 12-1841(A), which provides as follows:

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. . . In any proceeding in which a state statute . . . is alleged to be unconstitutional, the attorney general and the speaker of the house of representatives and the president of the senate shall be served with a copy of the pleading, motion or document containing the allegation at the same time the other parties in the action are served and shall be entitled to be heard.

A.R.S. § 12-1841(A). The State is correct in its contention that Defendant did not serve either the Arizona Attorney General or the President of the Senate or the Speaker of the House of Representatives. The question then is, what does this do to this appeal. The statute further provides:

If the attorney general or the speaker of the house of representatives and the president of the senate are not served in a timely manner with notice pursuant to subsection A, on motion by the attorney general, the speaker of the house of representatives or the president of the senate the court shall vacate any finding of unconstitutionality and shall give the attorney general, the speaker of the house of representatives or the president of the senate a reasonable opportunity to prepare and be heard.

A.R.S. § 12-1841(C). This Court concludes an appellant's failure to serve the above parties does not deprive a court of jurisdiction. This statute instead provides, if a court has declared a statute unconstitutional, any of the above parties may intervene, ask the court to vacate its previous order, and present their arguments in support of the constitutionality of the statute.

B. Is A.R.S. § 28-1382(E)(1) unconstitutional.

Defendant contends A.R.S. § 28-1382(E)(1) is unconstitutional when compared to A.R.S. § 28-1383(A)(2) and (D)(2) in that it denies equal protection. The Equal Protection Clause does not apply if the persons are not similarly situated. *State v. White*, 194 Ariz. 344, 982 P.2d 819, ¶¶ 38-39 (1999) (although defendant and his codefendant were both involved in the killing, defendant was the one who shot victim, thus defendant and codefendant were not similarly situated, thus death sentence for defendant and life sentence for codefendant did not violate equal protection). Under the Arizona statutory scheme, all persons with one prior conviction who are convicted of driving under the influence with a BAC of 0.20 or more are punished under A.R.S. § 28-1382(E)(1), while all persons with two prior convictions who are convicted of driving under the influence with a BAC of 0.20 or more are punished under A.R.S. § 28-1383(A)(2) and (D)(2). Thus, those convicted of the same conduct face the same punishment, so A.R.S. § 28-1382(E)(1) does not violate the Equal Protection Clause, and is therefore not unconstitutional.

Defendant's argument is a person convicted of driving under the influence with a BAC of 0.20 or more with one prior conviction must serve not less than 180 days in jail, while a person convicted of driving under the influence with a BAC of 0.20 or more with two prior convictions must serve not less than 4 months in prison, which Defendant contends is less serious punishment for a more serious offense. The applicable statutes provide as follows:

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E. If within a period of 84 months a person is convicted of a second violation of this section or is convicted of a violation of this section and has previously been convicted of a violation of § 28–1381 or 28–1383 . . . , the person:

1. . . . A person who is convicted of a violation of subsection A, paragraph 2 of this section [BAC of 0.20 or more] shall be sentenced to serve not less than 180 days in jail, 90 of which shall be served consecutively, and is not eligible for probation or suspension of execution of sentence unless the entire sentence has been served.

A.R.S. § 28–1382(E)(1).

A. A person is guilty of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs if the person does any of the following:

. . . .

2. Within a period of 84 months commits a third or subsequent violation of § 28–1381, § 28–1382 or this section or is convicted of a violation of § 28–1381, § 28–1382 or this section and has previously been convicted of any combination of convictions of § 28–1381, § 28–1382 or this section

. . . .

D. A person is not eligible for probation, pardon, commutation or suspension of sentence or release on any other basis until the person has served not less than 4 months in prison if the person is convicted under either of the following:

. . . .

2. Subsection A, paragraph 2 of this section and within an 84 month period has been convicted of two prior violations of § 28–1381, § 28–1382 or this section, or any combination of those sections

A.R.S. § 28–1383(A)(2) and (D)(2). For five reasons, this Court does not agree the punishment for a violation under A.R.S. § 28–1383 is less serious than the punishment for a violation under A.R.S. § 28–1382.

First, a violation under A.R.S. § 28–1382 is a class 1 misdemeanor, while a violation under A.R.S. § 28–1382 is a class 4 felony. A.R.S. § 28–1382(H); A.R.S. § 28–1383(L)(1). Thus, a person convicted under A.R.S. § 28–1383(A)(2) who then commits a subsequent felony faces mandatory prison, while a person convicted under A.R.S. § 28–1382(E)(1) who then commits a subsequent felony does not face mandatory prison.

Second, the maximum sentence for a class 1 misdemeanor is 6 months in jail. A.R.S. § 13–707(A)(1). Thus once a person serves the 180 days in jail, the person has served the entire sentence and may not be punished further for that offense. On the other hand, the 4 months in prison is a pre-condition to being placed on probation. Thus, once a person has served the 4 months in prison and is then released on probation, if the person violates a condition of probation, the person could be sentenced to return to prison, and would face a mitigated sentence of 1 year, a

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minimum sentence of 1½ years, a presumptive sentence of 2½ years, a maximum sentence of 3 years, and an aggravated sentence of 3¾ years. Further, a person convicted under A.R.S. § 1383 must complete an alcohol or drug program, and if the person fails to complete that program, the trial court may order the person be incarcerated for an additional 4 months in prison. A.R.S. § 28-1383(H)(1).

Third, while this Court agrees that 4 months is less than 180 days, it does not necessarily agree that 4 months in prison is less serious punishment than 180 days in jail. As the trial court noted, it could place Defendant on home detention, which would mean Defendant would spend 15 days in jail and 165 days on home detention. (R.T. of Jan. 24, 2012, at 5.) The trial court further noted Defendant could seek to be eligible for two-for-one credits, which would mean Defendant would serve only 90 days in jail. On the other hand, A.R.S. § 28-1383(D) precludes release on any basis until the person has served the 4 months in prison. Thus, the 180-day jail sentence could be less serious than the 4 months in prison.

Fourth, a person convicted under A.R.S. § 28-1382(E) must pay the following fines and assessments: § (E)(2), \$1,000; § (E)(3), \$250; § (E)(6), \$1,250; § (E)(7), \$1,250, for a total of \$3,750. On the other hand, a person convicted under A.R.S. § 28-1383(A)(2) must pay the following fines and assessments: § (J)(2), \$250; § (J)(3), \$750; § (J)(4), \$1,500; § (J)(5), \$1,500, for a total of \$4,000.

Fifth, a person convicted under A.R.S. § 28-1382(E) must have their driving privileges revoked for at least 1 year. A.R.S. § 28-1382(E)(5). On the other hand, a person convicted under A.R.S. § 28-1383(A)(2) must have their driving privileges revoked for at least 3 years. A.R.S. § 28-1383(J)(1).

III. CONCLUSION.

Based on the foregoing, for a conviction for driving with a BAC of 0.20 or more, this Court concludes the punishment for a violation under A.R.S. § 28-1383 is more serious than the punishment for a violation under A.R.S. § 28-1382, thus A.R.S. § 28-1382 is constitutional.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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